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December 26, 2003

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 "K" Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
DEC 29 2003
Part of
Public Record

RE: FD-34425

Dear Mr. Williams:

Enclosed is an original and eleven copies of Comments by Arkansas-Oklahoma Railroad, Inc., Pioneer Railcorp, Minnesota Commercial Railway Company, and the Small Railroad Business Owners of America, in the above-referenced proceeding. Please file same, and return the extra copy to me, "file-stamped". The verified statements which accompany these comments are being sent under separate cover.

If you have any questions about this matter, please do not hesitate to contact me.

Respectfully yours,

Daniel A. LaKemper

Encs.

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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34425

CITY OF LINCOLN

PETITION FOR DECLARATORY ORDER

COMMENTS

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Attorney for
Arkansas-Oklahoma Railroad, Inc.
Pioneer Railcorp
Minnesota Commercial Railway Co.
Small Railroad Business Owners of America

Dated: December 26, 2003.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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COMMENTS

Comes now Arkansas-Oklahoma Railroad, Inc. ("AOK"), Pioneer Railcorp ("Pioneer"), Minnesota Commercial Railway Company ("Minnesota Commercial"), and the Small Railroad Business Owners of America.("SRBOA"). AOK is a Class III carrier in Oklahoma, Pioneer is a publicly-traded holding company that owns 16 Class III carriers operating in Iowa, Illinois, Arkansas, Kansas, Michigan, Indiana, Tennessee, Mississippi, Alabama, and Pennsylvania. Minnesota Commercial is a Class III carrier operating in Minnesota. SRBOA is an Trade Association which includes some 43 shortline railroads, including Minnesota Commercial. AOK, Pioneer, Minnesota Commercial, and the SRBOA collectively represent some 50 shortline railroads.

AOK, Pioneer, Minnesota Commercial and SRBOA, for their comments to the Board with regard to the above-captioned proceeding, state as follows:

The Interstate Commerce Commission Termination Act ("ICCTA"), which created the Surface Transportation Board, strengthened the already explicit preemption provisions of Interstate Commerce Act. "When the ICCTA was enacted, Congress removed provisions in the former law giving the state a role in regulation of railroads.....Congress also chose to delete a policy statement concerning regulatory cooperation between state and federal authorities and another policy statement providing for joint state-federal regulatory bodies.....The clear message of the ICCTA is that there is no longer a place for states in the area of railroad regulation, ***Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota***, 236 F.Supp.2d 989, 1008-1009 (D. S.D. 2002).

Similarly, the Courts, right up to the Supreme Court of the United States, have consistently upheld federal preemption on issues of railroad regulation; the Supreme Court observing that railroad regulatory jurisdiction is "among the most pervasive and comprehensive of federal regulatory schemes," ***Chicago & North Western Transportation Co. v. Kalo Brick & Tile***, 450, U.S. 311, 318 (1981).

Still, state and local governments, particularly, and worst of all, municipalities, have not gotten the message. They continue to try to interfere with rail operations. In this case, the City of Lincoln believes it can decide how much of a railroad right-of-way is "needed" for rail operations. While municipal governments making such a determination is preposterous on its face, this is not a joke. These people are serious.

It goes without saying that if the City of Lincoln sought to condemn part of the right-of-way of Interstate 80 through the City, under the claim that the loss of the condemned portion would not interfere with highway travel, they would get nowhere. Yet railroads, even more so than highways, constitute an inter-connected national transportation system. Local regulations are totally incompatible with a national transportation system, and Congress has been as explicit as it can possibly be about it. The City cannot escape the nature of its action, by playing semantic games. The argument that taking part of a dedicated railroad right of way is not regulation because that part of the right of way is not "needed" is pure sophistry. There is no more dangerous form of regulation than being able to decide, arbitrarily, how much right of way a transportation system "needs". Just making such a decision (not to mention taking railroad right-of-way, to whatever extent, and for whatever purpose), is plainly an exercise of control over transportation by the City. Call it whatever you care to, its regulation. Naked and pervasive. Or, to use the words of Judge John C. Shabaz, "The City is impermissibly attempting to subject to state law, property that Congress specifically put out of reach. Congress' preemptive language and intent is paramount, and the nature of the preempted state regulation is irrelevant." (See ***Wisconsin Central Ltd. v. The City of Marshfield***, 160 F.Supp.2d 1009, 1013-1014 (W.D. Wis. 2000).

The evils that could, and almost assuredly will, eventually result, if the City is permitted to proceed with their condemnation action, are many. Any large-scale study would not do them justice. A few are briefly addressed in the Verified Statement of John W. Gohmann, President of Minnesota Commercial Railway Company, and of the Small Railroad Business Owners of America, attached hereto.

As pointed out by Mr. Gohmann, railroads need right of way for more than just the rails and ties. Derailments are an unfortunate fact of life. Providing some space on either side prevents damages and injuries, as well as necessary access for repairs and recovery. Future operating needs, including sidings, passing tracks, industry spurs, and trans-loading facilities are all dependent on adequate right-of-way. Safety and liability, of course, are other big issues. Unlike voluntary right-of-way sharing agreements, within which issues of fencing, crossings, access, drainage, and so forth can be negotiated, there is no such process in a condemnation context. Safety is ignored. Liability, for the railroad, becomes unlimited. As shown by the ***Nolan v. Soo Line Railroad Company*** case (a copy of which accompanies Mr. Gohmann's verified statement), railroads sometimes suffer very substantial liabilities from illegal users of their property. Property. The Board cannot simply ignore the reality of trail users being in close proximity to an operating railroad, with the rail carrier totally, and involuntarily, at risk if they injure themselves almost entirely due to their own stupidity. If, for instance, a bicyclist, snowmobiler, or other trail user veers over the unfenced trail boundary line and injures themselves on railroad property, the likelihood is that the railroad, not the City, will be subjected to substantial legal fees, if not the entire bill for the injuries. Such a situation is intolerable. For small railroads, it puts the financial health of carrier at risk, and with it, the shippers' service becomes a hostage to the next accident on the trail.

Finally, the demands of normal operations and maintenance may be impaired. As shown by the attached verified statement of David Donoley, President of AOK, the entire right of way is frequently needed for signals, communications, drainage, sight distances and normal maintenance.

The City would have the Board believe that this is the simple conversion of a short stretch of "unneeded" right of way to trail use, and the railroad will suffer no harm. Nothing could be further from the truth. There are numerous, serious, issues, which will not be addressed within a condemnation context, and which the City has neither the obligation, the expertise, nor the inclination, to address itself.

The Surface Transportation Board was created by Congress to regulate railroads for the benefit of shippers, the national economy, and national defense. Neither the Board, nor any rail carrier, has any obligation to provide right-of-ways for bicyclists. Giving municipalities the unfettered right to decide how much of a dedicated right-of-way an operating railroad "needs" and allowing them to arbitrarily seize what

they decide is unneeded would be an abdication of the Board's duty to the public, and would set a vary dangerous precedent.

The fact is, "condemnation statute[s], when applied by municipalities to property constituting rail transportation, frustrates Congress' purpose and policy of deregulating the railroads and divesting the states of their remaining authority over the railroads. The application of state law would mire the railroads in the very type of regulation from which Congress sought to free them. ...Giving effect to the condemnation authority of municipalities over railroad property conflicts with Congress' purpose in enacting the ICCTA," ***Wisconsin Central Ltd. v. City of Marshfield***, at 1015.

The Board should send a clear and unequivocal message to municipalities to keep their hands off railroad right of ways.

Respectfully submitted,

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Attorney for Arkansas-Oklahoma Railroad, Inc.
Pioneer Railcorp
Minnesota Commercial Railway Co.
Small Railroad Business Owners of America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by United States Mail, first class, postage fully pre-paid, this 26th. Day of December, 2003 upon:

Charles H. Montange
426 N.W. 162nd. St.
Seattle, WA 98177

Thomas McFarland
208 S. LaSalle St., Suite 1890
Chicago, Illinois 61604